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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 774

DAVID H. RYAN,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

DAVID H. RYAN,

Appellant,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

STATEMENT AS TO JURISDICTION.

Appellant, David H. Ryan, now is and at all times herein mentioned was a resident and citizen of San Diego, California. He had two contracts with the United States, one for preliminary excavation work for the construction of the Grand Coulee Dam, and one for the construction of a railroad from the Northern Pacific Railway tracks at Odair,

Washington, to the damsite for transporting materials and supplies to said project, all of said work being performed within the territorial confines of the State of Washington.

All of the work done by appellant in the performance of these contracts was upon land acquired by the United States by purchase or condemnation for the purpose of the construction of said dam, and appurtenant buildings and structures for improvement of navigation of the Columbia River, the acquisition of said lands being with the consent of the State of Washington and with jurisdiction over same ceded by the State of Washington to the United States by Section 8108 (Vol. 9, p. 276) of Remington's Revised Statutes of the State of Washington. This section provides generally that the State of Washington gives its consent to the acquisition by purchase or condemnation by the United States of lands within the limits of the State of Washington for the sites of locks and dams and other necessary structures and purposes required in the improvement of the rivers and harbors of the State and cedes jurisdiction over all lands acquired for said purposes to the United States, the only restriction thereon being the ordinary reservation of jurisdiction for service of process.

Appellant during the performance of the first contract had a warehouse upon the lands so acquired and held by the United States where he sold merchandise, such sales being made and payment received wholly upon said lands.

During the period within which appellant was engaged in carrying out said contracts there was in force in the State of Washington a law providing for the levy and collection of an excise tax, generally called the Occupation Tax Act, being Section 8370-1 *et seq.*, Remington's Revised Statutes of the State of Washington, providing in general for payment of a tax upon the gross income of all business conducted in the State of Washington.

Under this law the Tax Commission of the State of Washington levied an assessment against appellant upon income received by him from the United States from the performance of said contracts and from the sale of merchandise upon the lands so acquired and held by the United States.

Appellant paid said assessment and brought suit to recover same, as authorized by Section 8370-199 of Remington's Revised Statutes of the State of Washington, and also brought suit to restrain the Tax Commission of the State of Washington from levying or collecting any occupation tax from him on account of any income received by him from contracts performed or business transacted wholly upon the lands so acquired and held by the United States, which actions were consolidated for hearing in both the Trial and Appellate Courts.

Appellant contends that under Article I, Section 8, Clause 17 of the Constitution of the United States and Section 8108 of Remington's Revised Statutes of the State of Washington exclusive jurisdiction over said lands was vested in the United States;

Ft. Leavenworth Railroad Co. v. *Lowe,* 114 U. S. 525, 5 S. Ct. 995, 29 Law Ed. 264;

Surplus Trading Co. v. *Cook,* 281 U. S. 647, 50 S. Ct. 455, 74 Law Ed. 1091;

Standard Oil Co. v. *California,* 291 U. S. 242, 54 S. Ct. 381, 78 Law Ed. 775;

United States v. *Tucker,* 122 Fed. 518;

and that any attempt to levy and collect said tax is contrary to the Fourteenth Amendment to the United States Constitution;

Farmers Loan & Trust Co. v. *Minnesota,* 280 U. S. 204, 50 S. Ct. 98, 74 Law Ed. 371;

Safe Deposit & Trust Co. v. *Virginia,* 280 U. S. 83, 50 S. Ct. 59, 74 Law Ed. 180.

Appellant further contends that the tax on gross income received by appellant under contracts with the United States constitutes a direct burden upon the United States and was therefore illegal and void.

United States Glue Company v. *Town of Oak Creek*, 247 U. S. 321;

Dravo Contracting Company v. *Fox*, U. S. District Court, Southern District of West Virginia, decided October 1st, 1936; No. 625, October Term, 1936.

Appellant's actions were dismissed by the Supreme Court of the State of Washington on October 28, 1936, and this appeal is prosecuted under Section 344-a, Title 28 of the United States Code Annotated. Appellant's petition for allowance of this appeal was filed on January 15, 1937.

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EXHIBIT "A".

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EN BANC.

No. 26060

DAVID H. RYAN, *Appellant,*

v.

THE STATE OF WASHINGTON, *Respondent.*

DAVID H. RYAN, *Appellant,*

v.

THE STATE TAX COMMISSION, *Respondent.*

Filed October 28th, 1936

Plaintiff brought these two actions seeking (1) the refund of an amount exacted from, and paid by, him as an occupation tax, and (2) an injunction to prevent the imposition against him of a subsequent tax of the same kind. Trial before the court, without a jury, resulted in a dismissal of both actions. Plaintiff has appealed.

The taxes imposed by the state in the first case were based upon the total amount of sales of merchandise made by appellant and also upon the total amount of gross income received by him in the performance of a federal government contract, all such sales and operations having been made and conducted within the area comprised in what is known as the Columbia Basin Project. The tax sought to be enjoined in the second case was based upon the total amount of gross income received by appellant in the performance of a second, and subsequent, federal government contract operating within the same area. The principal question in the first case, and the only question in the second, is whether the state of Washington had any jurisdiction *within* the territory of the project, sufficient to permit the state to impose and collect an occupation tax for services

rendered therein by appellant to the federal government.

A brief history of the Columbia Basin Project will be of aid to a clearer understanding of the problem involved.

For a number of years, the people of this state have been actively interested in the development of the Columbia river and its tributaries. Between 1918 and 1932, many surveys and reports were made by engineers employed either by the state or else by the bureau of reclamation or the war department of the United States. These surveys and reports had relation to navigation, the development of hydroelectric power, and the reclamation of arid lands by irrigation. The state and its people were directly and particularly interested in, and concerned with, the features of power and reclamation. In 1932, the chief of engineers of the United States Army, after an exhaustive investigation, recommended a comprehensive plan for the improvement and development of the Columbia river for the purposes of navigation, flood control, power, and irrigation. The plan contemplated the ultimate construction of ten dams in the Columbia river, the first of which, together with a power plant, was to be erected at the head of Grand Coulee.

In 1933, the state legislature created the Columbia Basin Commission, consisting of five members, and authorized them to enter into contracts and to employ any and all means necessary to secure the immediate development of the Columbia Basin Project by means of the proposed Grand Coulee dam and the orderly development of the power, water, and soil resources incident thereto. Chapter 81, Laws of 1933, p. 376.

During this period of preparatory activities, the Grand Coulee dam and power plant had an indeterminate status, owing to the uncertainty as to whether the project would be a state or a federal project. It seems that originally it was contemplated that the Columbia Basin Commission should at least carry on the necessary preliminary engineering. For that purpose, the Columbia Basin Commission obtained from the State Emergency Relief Commission an allocation of $377,000 of emergency relief funds. This had the effect of tying in the project with the matter of emer-

gency relief work, which was seriously engaging the attention of this, and of other states, at that time.

On June 30, 1933, the Columbia Basin Commission, in pursuance of its plan, entered into a contract with the United States, represented by the Bureau of Reclamation, Department of the Interior, wherein the United States agreed to make the topographic surveys and explorative work and to prepare the designs and specifications for construction work on the dam, for which the Columbia Basin Commission agreed to pay an initial sum of $50,000. at the time of the execution of the contract and the balance of the allocation of $377,000 as the work progressed. It appears that, during the period with which we are here concerned, the greater part of the $377,000 was paid as agreed.

It soon became apparent, however, that the work of construction itself would be of such magnitude and the expense so great that its completion would require the intervention of no less an agency than the federal government itself, with the unlimited financial resources at its command. Consequently, steps were taken to have the Grand Coulee dam and power plant included in the federal public works program. After considerable effort, this was accomplished, and an allocation of sixty-three million dollars for the dam and power plant was made by the federal bureau commonly known as NIRA.

On November 1, 1933, the United States, represented by the Secretary of the Interior, and pursuant to the reclamation laws and the National Industrial Recovery Act, and the state of Washington, acting through the Columbia Basin Commission, entered into a contract relating to the construction of the dam, power plant, and power transmission lines at the Grand Coulee site, under the comprehensive plan above mentioned.

Some of the provisions of that contract are of particular interest in this controversy. The contract began with a series of ten recitals. No. 1 referred to the fact that the allotment of sixty-three million dollars, appropriated by NIRA, had been made available for the *construction* of the dam and power plant. No. 9 recited that the increased amount of firm power made possible at the lower dams by

reason of the storage behind the Grand Coulee dam was an important factor in making the lower dams self-liquidating. No. 10 referred to the fact that the Columbia Basin Commission had been created by the state legislature for the purpose of co-operating with the federal government in *securing the construction* of the project and of the Grand Coulee dam.

The contract then set forth the articles of agreement by number. The first, which is numbered article 11, provided for the expenditure by the United States of sixty-three million dollars, or so much thereof as was found necessary, in the *construction* of a dam and power plant at Grand Coulee site. Article 12 provided that the United States should retain title to the dam and power plant until the cost of the project had been fully repaid into the treasury of the United States. Article 13 reads as follows:

> "13. Commission to Act in Advisory Capacity. The Commission will act as an advisory board representing the state in an advisory capacity in conferences with officers of the United States *concerning the various important questions which may arise from time to time in connection with the construction and use of the said dam, power plant and transmission lines.*" (Italics ours.)

Then followed a number of provisions giving the state an option, for a period of eight and one-half years after the date of the contract, to purchase the perpetual right to the entire output of the dam and power plant, upon the conditions set forth in detail therein. Article 24 reads as follows:

> "24. Rules and Regulations by Secretary. The Secretary shall have the right to adopt and promulgate rules and regulations for the administration of the said project and the right to determine and decide all questions arising in connection with or growing out of the construction or operation and maintenance of said proposed dam, power plants and transmission lines *and which are not expressly determined by law* or the terms of this contract, and his decisions on such questions shall be conclusive." (Italics ours.)

At this point, appellant's first connection with the project appears. On November 29, 1933, appellant, a resident of San Diego, California, entered into a contract with the United States for the excavation of overburden at Columbia river dam site, Columbia Basin Project, "Washington," for the sum of $534,500. The specifications, attached to and made a part of the contract, provided, among other things, that the appellant should obtain all required licenses and permits, should give preference, after ex-service men, to citizens who were residents of the county and *state in which the work was to be performed,* should furnish compensation insurance in compliance with the laws of the *state wherein the work was to be done,* and should comply with all applicable provisions of federal, *state and municipal* safety laws and building and construction codes.

Appellant entered upon the execution of the work under the contract about January 1, 1934, and completed it in the summer of the same year. During the entire performance of the work, appellant maintained his office and living quarters within the territory of the project as hereinafter designated.

After the completion of that contract, appellant, on July 18, 1934, entered into a second contract with the United States, which was for the construction of a railroad at Grand Coulee dam, Columbia Basin Project, "Washington," for the sum of $235,570. The railroad was to be 34.5 track miles in length, extending from the Northern Pacific Railway tracks at Odair, Washington, to the dam site. The specifications in this contract contained the same provisions as those to which we have specifically referred above. The actual residence of appellant, for about one-half of the time during which the second contract was being performed, was at Coulee City, which is outside of the territory of the project, and for the remainder of the time was at the dam site, on government land which had been obtained in the manner hereinafter described.

On July 16, 1934, which was two days before the execution of appellant's second contract, the United States entered into a contract with Silas Mason Company, Inc., and others, for construction work on Grand Coulee dam and

power plant, Columbia Basin Project, "Washington," for the sum of $29,339,301.50. The last mentioned contract contemplated work on a gigantic scale, as is indicated by the figures just given. That contract, however, did not include the work to be done by appellant under either of his contracts.

We make reference, at this time, to the contract of Silas Mason Company, Inc., for the reason that out of it grew an action similar to the two involved here. Silas Mason Co. *v.* State Tax Commission, *ante*, p. —. That action and these two were tried in the superior court at the same time and, by stipulation of the parties, all the evidence, insofar as it was material, was considered as applying to all three cases. The respective appeals were argued in this court on the same day, upon records containing identical statements of facts.

The specifications attached to the contract of Silas Mason Company, Inc., provided, among other things, and in addition to what has already been mentioned, that the contractor should make all necessary arrangements with the proper *state and county authorities* for school facilities, and that police protection for the contractor's camp and the area involved in and surrounding the construction work would be furnished by the Washington State Patrol in co-operation with the federal government, but that the contractor should provide, at its camp site, such jail facilities as were satisfactory to the Washington State Patrol.

The area included in the entire project above mentioned does not specifically and satisfactorily appear from the record, and we are unable to say exactly how much land is included therein. It does appear, however, that the area is very extensive, covering many acres of land on both sides of the Columbia river and including a railroad right of way 34.5 miles in length. There are two important things, however, to be noted in this connection. The first is that, during the time that the construction work was in progress, the United States, through condemnation proceedings brought against a number of individuals and corporations, acquired possession of, and title to, the various tracts of land now within the area of the project. A tran-

script of one of such condemnation proceedings, stipulated to be similar in form to all the others, is made a part of the record herein. It shows that the title to that particular tract was acquired by the United States on or after May 14, 1934, which was *after* appellant had commenced work. The other important factor to be noted is that, included in the area of the project, are school lands of the state and also tribal lands, all of which have been taken over by the federal government and now form a part of the project.

At the seventy-fourth session of the United States Congress, an act was passed authorizing the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes. The act ratified and validated all contracts and agreements that had been theretofore executed in connection with the Grand Coulee dam project. H. R. 6732, Public Act 409. The work contemplated to be done upon the project by the United States was not in furtherance of any war measure or for the national defense, but simply for the improvement of navigation and for industrial recovery.

During the period of the construction work under his first contract, appellant maintained warehouses on ground within the project and at the dam site, where he stored and sold gasoline, oil, tires, and automobile accessories. Appellant paid the state a tax on these sales, the recovery of which forms a part of the basis of his first action.

At its regular session of 1933, the legislature of this state passed an act commonly known as the occupation tax act, chapter 191, Laws of 1933, p. 869, et seq. The act related to certain business activities "within this state." At its special session of 1933, the legislature amended the former act in certain respects. Chapter 57, Laws of 1933, Ex. Ses., p. 157 et seq. That act likewise applied to business activities "within this state." The latter act became effective January 18, 1934, which was shortly after appellant's first contract had been entered into, but before it was performed.

These two actions are in resistance to the application of either of these legislative acts to appellant's activities.

Appellant's first contention is that his construction or excavation contracts constituted sales of services, within the provisions of chapter 191, and that by § 5 of that act, read in connection with § 2 (2)(f), the proceeds of his contracts were exempt from the tax.

The answer to this contention is that the tax was not imposed under chapter 191 as it originally stood, but under chapter 57, § 1 (designated as § 2-a) (1), which clearly covers business activities of the kind engaged in by appellant, if "within this state." This contention of appellant is but briefly discussed by either counsel, and, we think, merits nothing further than what we have already said.

The principal, and only remaining, question in the case is whether appellant's activities took place "within this state." Specifically stated, the contention of appellant is that, by virtue of the United States constitution and the statutes of this state, the area contained within the project upon which the excavation and construction work was performed is under the exclusive jurisdiction of the United States, and that, therefore, any tax legislation of the state is wholly inoperative within the area of the project or upon any activities of appellant therein. Quotation of the specific constitutional and statutory provisions involved will first be made.

Art. I, § 8, clause 17, of the constitution of the United States provides that Congress shall have power:

> "To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, *and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;* * * *" (Italics ours.)

Our reference to, and discussion of, this constitutional provision relate only to the latter, or italicized, portion of the quotation.

Rem. Rev. Stat., § 8108, adopted in 1891, provides that:

> "The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy-yards, naval stations, or other needful buildings authorized by any act of congress, * * * the consent herein and hereby given being in accordanee with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

It will be observed that the statute, while somewhat broader than Art. I, § 8, clause 17 in its designation of structures and purposes, nevertheless specifically recites that the con-

sent therein given is in accordance with the constitutional provision.

The provision of Art. I, § 8, clause 17, as above quoted and italicized, has been frequently construed by the United States Supreme Court, and it is now definitely settled and accepted that there are two ways in which lands within the jurisdiction of the state may become subject to the exclusive jurisdiction of the United States: (1) by purchase by the United States for certain specified purposes, with the consent of the state, and (2) cession of exclusive jurisdiction to the United States by the state. Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761; Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091; Standard Oil Co. *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.

From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I, § 8, clause 17, by purchase with consent of the state, federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the state, then federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the state, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state. Our ultimate problem herein will be to determine under which one or more, if any, of these classifications, the present case falls.

Manifestly, the construction work involved in this case does not come within any of the uses implied in the descriptive terms of the constitutional provision, unless it can be said to come within the term "other needful buildings." If

the case were one of first impression, the rule of *ejusdem generis* would, in our opinion, exclude such work from the classification of "needful buildings" because the particular work was in no way connected with, or related to, forts, magazines, arsenals, or dockyards.

However, by judicial interpretation, over a long period of years, the term "needful buildings" has been applied to the following: a navy yard (Western Union Tel. Co. *v.* Chiles, 214 U. S. 274, 29 S. Ct. 613, 53 L. Ed. 994); a military hospital (Arlington Hotel Co. *v.* Fant, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447); a military reservation (United States *v.* Unzeuta, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761); an army training and mobilization station (Surplus Trading Co. *v.* Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091); a custom house (Sham *v.* Hill, 24 Fed. 726); *locks and dams* (United States *v.* Tucker, 122 Fed. 518); a post office (United States *v.* Andem, 158 Fed. 996); a penitentiary (Steel *v.* Halligan, 229 Fed. 1011); an Indian training school (United States *v.* Wurtbarger, 276 Fed. 753); a military cemetery (Wills *v.* State, 50 Tenn. 141); a soldiers' home (Sinks *v.* Reese, 19 Ohio 306); a courthouse (State *v.* Mack, 23 Nev. 359, 47 Pac. 62).

While the structures mentioned in the foregoing cases are not specifically named in, and do not strictly fall within, the constitutional classification, it is, nevertheless, apparent that the particular structures or "buildings" in those cases, with the possible exception of one, are such as would necessarily require absolute and exclusive jurisdiction in the United States government, because their operation is in the discharge of a constitutional or governmental function, and there is no field for state participation or state legislation. The only possible exception in the list is the instance of locks and dams, involved in the Tucker case. But even in such case, if the locks and dams were owned and operated by the United States solely for the purpose of facilitating navigation, as they concededly were in that case, their function would likewise be a constitutional or governmental function. But irrigation, flood control, and power development (except insofar as the latter two are intended to promote navigation or else some war measure or the national

defense), while they may be of national interest and serve a public purpose, are not functions enjoined upon the federal government by the constitution, nor are they delegated to the United States by the constitution, nor is it necessary that they be committed, for their operation, to the exclusive jurisdiction of the United States government. Legislative power, with reference to such things, is reserved in the state.

Turning, now, to the statute above quoted, we note that the state has given its consent to the acquisition, by purchase or condemnation on the part of the United States, of lands for sites of locks, dams, etc., as well as for the purposes set forth in the constitutional provision. For present purposes, it may be conceded that the term "needful buildings" is broad enough, under the construction given to that term by the federal courts, to include locks and dams. It is very probable that specific mention of locks and dams was made in the statute in order to remove any doubt that may have existed generally at, and prior to, the time of the decision in the Tucker case, with respect to the inclusive extent of the constitutional provision.

The point that we make and stress here, and upon which we rest our ultimate conclusion herein, is that, while the statute conferred consent upon the United States to acquire land within the territory of the state, the state's power to cede jurisdiction is limited, by the statute, to these instances where it clearly appears that the land is to be used by the United States for a constitutional or governmental purpose. As stated in the leading case upon the subject, Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264, *supra:*

> "The essence of that provision [Art. I, § 8, clause 17, United States Constitution] is that the state shall *freely* cede the particular place to the United States for one of the specifically enumerated objects." (Italics ours.)

The question in this case, then, is whether, by reason of the conjunction of the constitutional provision, the statute, and the acquisition by the federal government of the lands within the project in the manner and for the purposes that the government acquired them, the state has been *ipso facto*

deprived of all jurisdiction with respect to such lands. However close the question may seemingly be, we are of the opinion that the state has not been deprived of all jurisdiction, but that it has a concurrent jurisdiction to the extent, among other things, that it has the right to impose a tax upon business activities conducted within the area of the project. The reason for this conclusion is based upon what we conceive to be fundamental principles of law and the conducive facts of this case.

By the enabling act of Congress, passed February 22, 1889, the territory of Washington became the state of Washington. Subject to the limitations and restraints of the federal constitution, the state, as such, has all the sovereign powers of independent nations over all persons and things within its territorial limits. Sturges *v.* Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; New York *v.* Miln, 11 Pet. 102, 9 L. Ed. 648; Cummings *v.* Missouri, 4 Wall. 277, 18 L. Ed. 356. The area within, and under, the jurisdiction of a state may come under the exclusive jurisdiction of the United States by purchase by the federal government for a purpose prescribed by the federal constitution and with the consent of the state, or by cession of exclusive jurisdiction by the state to the United States. In either event, the land acquires a territorial status and ceases to be a part of the state, either territorially or jurisdictionally. Concessions Co. *v.* Morris, 109 Wash. 46, 186 Pac. 655. But, since self-preservation is the first law of nations and states, as well as of individuals, it will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty. Wills *v.* State, 50 Tenn. 141; *In re* Kelly, 71 Fed. 545; *Ex Parte* Gibbons, 56 Ark. 277, 19 S. W. 602; Barrett *v.* Palmer, 135 N. Y. 336, 31 N. E. 1017, 31 Am. St. 835, 17 L. R. A. 720 (Four of these cases are cited approvingly in the Concessions Co. case).

The power of taxation is an incident of sovereignty and inherent in the state, because government cannot exist or function without it. It is a legislative power following the more general power to make laws. State ex rel. Commissioners *v.* Clausen, 95 Wash. 214, 163 Pac. 744. The power of taxation is never to be suspended, surrendered, or contracted away. Amendment XIV, Washington constitution.

In the absence of constitutional restraint, the power of the legislature over taxation is as unlimited as the subject with which it deals. State ex rel. State Tax Commission *v.* Redd, 166 Wash. 132, 6 P. (2d) 619; 26 R. C. L. 27, § 13. The taxing power of the state is never presumed to have been relinquished unless the language in which the surrender is made is clear and unmistakable. Erie R. Co. *v.* Pennsylvania, 21 Wall. 492, 22 L. Ed. 595; 1 Cooley on Taxation (4th ed.) 159, § 60.

This is not a contest between the federal government and the state as to jurisdiction. It is a contest between the state, asserting its concurrent, or partial, jurisdiction, and an individual who asserts that exclusive jurisdiction rests in the federal government. So far from there being any contest as to jurisdiction between the two sovereign powers, the record discloses that they are working in harmony and accord, each exercising the field for which it is the better equipped and each, at the same time, recognizing the field of the other. The federal government, therefore, cannot possibly be prejudiced by the result of this action.

It appears from what we have already stated that prior to, at the time of, and at all times since, the inception of the project, the United States and the state have co-operated in every way in the development and construction of the dam and power plant. The federal government at present furnishes the money, supervises the work, and will, for a time, maintain the operation of the project. The state, on the other hand, has furnished a large amount of money for the preliminary work and now, through the Columbia Basin Commission, acts in an advisory capacity to the federal government in the further progress of the work. The state also has an option to take over the entire project when completed. The federal government is involved in a huge undertaking, the object of which is to promote navigation, develop power, and provide for irrigation. The state is likewise concerned. Navigation is a function that comes within the exclusive power of the federal government by virtue of the constitution of the United States. The development of irrigation and of power for industrial purposes, however, is within the reserved powers of the state. There is, thus, every reason why the federal government and the

state should co-operate, and, in order to do so, each must have proportionate jurisdiction.

> "We have in this Republic a dual system of government, National and state, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty." South Carolina *v.* United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261.

On the other hand, if the state were excluded from all jurisdiction, the residents of the project would be without school facilities, police protection, and the right to vote, the workmen would be deprived of the benefit of industrial insurance, and the rules for sanitation would be suspended; for, if the state be wholly without jurisdiction, then it must follow that the state may not extend its privileges to the residents of the project nor expend its money in their behalf. Opinion of Justices, 42 Mass. 580; In re Town of Highlands, 22 N. Y. Supp. 137; Sinks v. Reese, 19 Ohio 306; State ex rel. Lyle v. Willett, 117 Tenn. 334, 97 S. W. 299; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 S. Ct. 995, 29 L. Ed. 264; Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091.

Furthermore, so far as the record supplies us with any information, the federal government did not acquire these lands until after the work of construction, under appellant's first contract, had been begun. Some of the lands, it appears, were not acquired until about the time that the work under the contract was completed. The record discloses that when appellant entered into the second contract, although all of the lands had then been acquired, the state was exercising its jurisdiction within the project at the in-

stance of the federal government itself. Moreover, it does not appear from the record that the federal government ever set apart any definite reserve as constituting the project, but, rather, that it appropriated lands from time to time as the necessities of the project required; this fact may not be a controlling one, but is nevertheless entitled to consideration.

The facts, taken as a whole, argue conclusively, in our opinion, that the state never intended to cede, and the United States never intended to take, exclusive jurisdiction over the project. Facts consistent with the retention, and inconsistent with cession, of exclusive jurisdiction by the state should, in the absence of any assertion by the federal government to the contrary, be construed most strongly in favor of the state, to the end that its territory be not diminished and that its jurisdiction in matters in which the federal government is not directly or immediately concerned be not entirely lost.

We conclude, therefore, that the purposes of the project, taken as a whole, do not fall exclusively within any of the enumerated classes mentioned above, so as to give the United States exclusive jurisdiction over the lands, but, rather in a class where several purposes are so intermingled as to call for the exercise of jurisdiction by both the federal government and the state, according as their respective interests and duties require. Insofar as the legislative acts in question are concerned, they are operative upon the business activities of the appellant within the project.

The judgments are affirmed.

STEINERT, *J.*

We concur:

MILLARD, *C. J.*
MAIN, *J.*
MITCHELL, *J.*
TOLMAN, *J.*
HOLCOMB, *J.*
BEALS, *J.*
BLAKE, *J.*
GERAGHTY, *J.*

APPELLANT'S BRIEF

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No. [redacted] 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

DAVID H. RYAN,

Appellant,

vs.

THE STATE OF WASHINGTON,

Appellee.

DAVID H. RYAN,

Appellant,

vs.

TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES, AND T. M. JENNER, CONSTITUTING THE TAX COMMISSION OF THE STATE OF WASHINGTON,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

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No. 774

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF APPELLANT

I.

OPINION OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in these cases (R., p. 36) is reported in 88 Washington Decisions at page 75.

II.

JURISDICTION.

Appellant refers to the statement as to jurisdiction which is a part of the record and printed separately.

III.

WASHINGTON STATUTES INVOLVED IN THIS APPEAL.

Section 8108 of Rem. Rev. Stat., which provides for the acquisition by the United States of real estate within the State of Washington for the purposes within Article I., Section 8, Clause 17 of the United States Constitution, and for the further purpose of improvement of the navigable rivers and harbors in the State of Washington, reads as follows:

> "The consent of the State of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval stations, or other needful buildings authorized by any act of congress . . . the consent herein and hereby given, being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United

States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

Section 2a of Chap. 57, the Laws of Washington, Extraordinary Session, 1933, p. 157, which provides for an excise tax upon the gross income from business transacted in the State of Washington, is as follows:

"Section 2a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under Section 2 of this act, an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *"

IV.

STATEMENT OF THE CASE.

The Columbia is the second largest river in the United States. It is navigable in law and in fact. In 1932 the United States Army Engineering Corps made a report to the Secretary of War embodying a comprehensive plan to improve navigation of this river, including the construction of ten dams to store the flood waters, to be released in time of slack water,

and providing for development of hydroelectric energy as a means of repaying the cost of the improvement and of furnishing irrigation for a large tract of arid land.

The two key dams mentioned in this plan, one at Bonneville, Oregon, on the boundary between Oregon and Washington, and one at Grand Coulee, in the State of Washington, are now under construction, and out of the construction of the Grand Coulee Dam these cases arise.

These two cases involve the same questions of law and substantially the same questions of fact. They were consolidated for trial and also upon appeal to the Supreme Court of the State of Washington. All facts were stipulated in open court upon the trial and are a part of record. There was also tried at the same time the case of Silas Mason Company, Incorporated, et al., vs. Tax Commission of the State of Washington, a companion case to these now on appeal in this court, and the record contains the stipulated facts in all three cases, with the agreement of counsel that any facts stipulated upon said trial might be used in either of said cases where relevant and material.

In the fall of 1933 the United States Department of Interior let a contract to appellant, a resident of San Diego, California, for removal of the overburden at either end of the proposed Grand Coulee Dam to be constructed across the Columbia River in the State of Washington. Work was started under this contract by appellant about January 1st, 1934, and completed in the spring of that year.

All of this contract was performed through subcontractors. During its performance appellant maintained at the site of the operations a warehouse, where he stored and sold gasoline, oil, grease, automobile tires and accessories. All of the land upon which appellant performed the contract and stored and sold the merchandise had been acquired by the United

States, with consent of the State of Washington, prior to commencement of performance by appellant, by purchase or condemnation, for the purpose of the construction of the dam and the necessarily appurtenant structures, and during all of said time appellant had his place of business upon such ground, where he transacted all his business and received all his income; appellant maintained a small staff of employees to supervise the work and to handle the merchandise. (R., p. 11.) He was required by his contract to (R., p. 26) and did report such payroll to the Department of Labor & Industries of the State of Washington and paid the required insurance premiums thereon. (R., p. 8-11.)

The Tax Commission of the State of Washington made and served upon appellant an assessment in the sum of $4,012.25, on account of excise tax of ½ of 1% on gross income received by him as proceeds of payments from the United States on said contract and from sales of merchandise under Section 2a (1), Chap. 57 of Laws of Washington, Extraordinary Session of 1933. Appellant paid said assessment, and in accord with the procedure outlined in said taxing act, petitioned for return of said sum, and upon the petition being denied brought suit for recovery of same.

In the summer of 1934, and after completion of the first contract, appellant was awarded a second contract by the Department of the Interior to build a "construction railroad" from the Northern Pacific Railway line at Odair, Washington, to the dam-site, to be used in transporting materials and supplies necessary for construction of the dam and for its maintenance after completion. The entire performance of this contract was upon land acquired by the United States by purchase or condemnation for the construction of the railroad. Appellant performed this work himself, and, as required by his contract, reported his payrolls to the Department of

Labor & Industries of the State of Washington and paid insurance premiums thereon. During the performance of the first part of the contract appellant maintained his office at Coulee City, Washington, and off the right-of-way, but later moved the office back to the damsite and upon government property, where it remained until the completion of the work. (R., p. 15.)

The Tax Commission of the State of Washington made demand on appellant that he make returns of his gross receipts from said contract, and he brought action to restrain the Commission from attempting to collect any tax thereon. These actions were dismissed by the Trial Court, and the judgments were affirmed by the Supreme Court of the State of Washington.

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON.

Two questions were presented to the Supreme Court of the State of Washington, and both were decided adversely to appellant.

1. Was the levy of the occupation tax upon the gross income received by appellant under his contracts with the United States a direct burden upon the United States, and therefore illegal and void?

2. When the United States acquired the land, upon which appellant performed all his work and received all his income, by purchase with consent of the State of Washington, for the purpose of construction of a dam with appurtenances to improve the navigation of the Columbia River, and the State of Washington ceded jurisdiction over lands acquired by the United States in the improvement of the rivers and harbors of the State, can the State of Washington levy a valid tax upon appellant based upon his gross income so received?

VI.

SPECIFICATION OF ERRORS.

The errors assigned in the record which appellant intends to urge, and upon which appellant relies for reversal of the judgment in these cases are:

1. The Supreme Court of the State of Washington erred in not holding that under Article I., Section 8, Clause 17 of the Constitution of the United States the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation with the consent of the State of Washington, under Section 8108, Remington's Revised Statutes of the State of Washington, for the purpose of construction of the Grand Coulee Dam, with necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

2. The Supreme Court of the State of Washington erred in not holding that the United States had exclusive jurisdiction over lands within the territorial jurisdiction of the State of Washington acquired by the United States by purchase or condemnation for the purpose of the construction of the Grand Coulee Dam, with the necessary appurtenant buildings and structures, for the improvement of navigation of the Columbia River, jurisdiction over which was ceded to the United States by the State of Washington under Section 8108, Remington's Revised Statutes of the State of Washington, and upon which lands so acquired and held the said David H. Ryan, appellant herein, performed all the work and received all the income on which the State of Washington has levied and seeks to levy an excise tax.

3. The Supreme Court of the State of Washington erred in holding that the said David H. Ryan, appellant herein, was liable to pay to the State of Washington, an excise tax under Section 8370-1, *et seq.*, Remington's Revised Statutes of the State of Washington, Chapter 191, Session Laws of the State of Washington for 1933, as amended by Chapter 57 Extraordinary Session of 1933, on account of gross income received by him for work done and merchandise sold wholly upon and within the confines of land acquired by the United States by purchase or condemnation within the territory of the State of Washington with the consent of the State of Washington and with jurisdiction thereon ceded by the State of Washington to the United States by virtue of Section 8108 Remington's Revised Statutes of the State of Washington and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, for the purpose of the construction of the Grand Coulee Dam for improvement of navigation of the Columbia River, together with the necessary buildings and structures appurtenant thereto.

4. The Supreme Court of the State of Washington erred in dismissing the action of appellant David H. Ryan herein: First: To recover back money paid to appellee, The State of Washington, on account of an assessment made therefor by the Tax Commission of the State of Washington for excise taxes alleged to be due from said appellant, and, Second: To restrain the appellees, the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, constituting said Tax Commission, from collecting or attempting to collect any further excise taxes from appellant; on the ground that all income earned and received by appellant within the State of Washington was so earned and received by him wholly upon and within the confines of lands acquired by the United States by purchase or condemnation with the consent of the State of Washington and with jurisdiction thereover ceded

by the State of Washington to the United States under Section 8108, Remington's Revised Statutes of the State of Washington, and in accordance with Article I., Section 8, Clause 17 of the Constitution of the United States, and that the said action of appellees, State of Washington and its Tax Commission, in collecting and seeking to collect said tax is in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant, David H. Ryan, of his property without due process of law and denies to him equal protection of the laws.

5. The Supreme Court of the State of Washington erred in not holding that the occupation tax levied and collected or sought to be levied and collected by the appellees, being a tax upon the gross income of the appellant received under contracts with the United States, constituted a direct burden upon the United States and was therefore illegal and void.

VII.

SUMMARY OF ARGUMENT.

While two questions are raised on this appeal, only one will be argued at length. The question as to the tax being a direct burden upon the United States will be fully argued in the case of Silas Mason Company, Incorporated, *et al., vs.* Tax Commission of the State of Washington, the companion case to these, which is now on appeal in this court.

The main question argued herein is whether the State of Washington can levy a valid tax against appellant, based upon his gross income from work done and business transacted upon lands acquired by the United States by purchase with consent of the State, for improvement of navigation of the Columbia River, and over which the State had ceded jurisdiction to the United States by Section 8108 of Remington's Revised Statutes of Washington. The points will be argued as follows:

1. The levy of an occupation tax of a fixed percent of the gross income of appellant, received as the stipulated payment from the United States for the performance of two contracts is a direct burden upon the United States.

2. The Grand Coulee Dam area, having been acquired by the United States by purchase with consent of the State of Washington for the purpose of improvement of navigation of the Columbia River, and the State of Washington having ceded jurisdiction to the United States over lands acquired for improvement of the rivers and harbors of the State, such area is not within the State of Washington and a tax levied by the State on persons or property therein is void.

VIII.

ARGUMENT.

The levy of an occupation tax of a fixed percent of the gross income of appellant, received as the stipulated payment from the United States for the performance of two contracts is a direct burden upon the United States.

The rule that the states have no power to burden the United States in any operations involving the proper exercise of its constitutional powers was established in McCulloch *vs.* Maryland, 4 Wheat., 316.

It is likewise established that a tax measured by gross receipts is a direct burden upon the business affected; United States Glue Company *vs.* Town of Oak Creek, 247 US., 321; 38 S. Ct. 499; 62 L. Ed., 1135, and where the business in question is a contract with the United States involving the performance of a governmental function such a tax is a direct burden upon the United States and therefore void; Dravo Contracting Company *vs.* Fox, 16 Fed. Sup. 527.

As stated before, this question is fully presented in the case of Silas Mason Company, Incorporated, *et al.*, *vs.* Tax Commission, on appeal in this court. Appel-

lant herein adopts the brief and argument of the appellants in that case, and will present no further argument thereon.

The Grand Coulee Dam area, having been acquired by the United States by purchase with consent of the State of Washington for the purpose of improvement of navigation of the Columbia River, and the State of Washington having ceded jurisdiction to the United States over lands acquired for improvement of the rivers and harbors of the State, such area is not within the State of Washington and a tax levied by the State on persons or property therein is void.

But there is an additional and more comprehensive reason why the decision of the Supreme Court of Washington should be reversed. It is more comprehensive because the decision will determine the right of the State of Washington to levy this excise upon the proceeds of appellant's sales of merchandise and to levy ad valorem taxes upon the property situated on lands within this area.

Counsel have stipulated that all of the lands upon which these contracts were performed by appellant were acquired by the United States, prior to commencement of the work, by purchase with the consent of the State of Washington for the purpose of construction of a dam, with necessary appurtenances, across the Columbia River; that all of the land upon which appellant performed his contracts was necessary for the construction of said dam and appurtenances, and that the contracts of appellant were a necessary part of said construction; that all of appellant's work was above the high-water mark of the river; that appellant was not a resident of the State of Washington, and that all his work was performed and all his income was received within the confines of the land so acquired by the United States. (R., p. 8-9.)

In the case of Fort Leavenworth Railroad Company *vs.* Lowe, 114 U. S., 525; 5 S. Ct. 995; 29 Law Ed.,

264, Mr. Justice Field, in a very able and comprehensive opinion, set forth the varying conditions under which the United States would or would not have exclusive jurisdiction over land acquired by virtue of Article I., Section 8, Clause 17, of the Federal Constitution. That decision has ever since been regarded as the leading case upon the interpretation of Clause 17. From it certain rules may be clearly deduced, which appellant believes are properly set out in the opinion of the Supreme Court of Washington as follows:

> "From these cases, the following rules are deducible respecting jurisdiction over lands acquired by the United States for public uses: (1) When the land is acquired for one of the purposes within Art. I., Sec. 8, Clause 17, by purchase with consent of the state, Federal jurisdiction is exclusive in such area for all purposes; (2) when the land is acquired for one of the purposes within that clause, but other than by purchase with the consent of the state, then Federal jurisdiction is exclusive only to the extent of the purposes for which the land is held; (3) when the land is acquired for a purpose not within that clause, but by purchase with the consent of the state, then the United States has such jurisdiction over the land as may be ceded to it by the state; and (4) when the land is acquired for a purpose not within that clause, in any manner other than by purchase with the consent of the State, then the United States holds the land just as any other proprietor does, except that the land may not be taxed by the state." (R., p. 44.)

If it shall appear, therefore, that this land was acquired for one of the purposes set forth in Clause 17, the exclusive jurisdiction of the United States thereover necessarily follows. Out of the purposes named in Clause 17 the only one under which the present acquisition may be placed is that of "other needful build-

ings." Under and included within the scope of this phrase the courts have placed the following:

Post Offices and Federal Court Houses, State *ex rel* Jones *vs.* Mack (Nev.) 47 Pac., 763.

Soldiers Homes, People *vs.* Mouse (Cal.) 265 Pac., 944.

Indian Schools, United States *vs.* Wurtzbarger, 276 Fed., 753.

Customs House, Sharon *vs.* Hill, 24 Fed., 726.

Federal Penitentiary, Steele *vs.* Halligan, 229 Fed., 1011.

Military Cemetery, Wills *vs.* State, 50 Tenn., 141.

Locks and Dams, United States *vs.* Tucker, 122 Fed., 518.

A careful search has revealed only the case of United States *vs.* Tucker, *supra.*, where locks and dams were considered in connection with Clause 17, until the recent case of Atkinson *et al. vs.* State Tax Com. of Oregon, 62 Pac. 2nd, 13. (*Reversed on rehearing, April 6th*, 1937.)

The Tucker case has been cited numerous times, and has never been modified or overruled. It is strictly in point here, and the court, in its decision, makes the following pertinent comment:

> "While there might possibly be some difficulty, if the question was *res integra,* as to the strictly proper construction and applicability to the case of locks and dams of the words 'for the erection of forts, magazines, arsenals, dock yards, and other needful buildings' used in the clause of the Constitution above quoted, the cases seem to leave no doubt that the broadest construction has been wisely put upon that language—one which makes it cover all structures and all places necessary for carrying on the business of the national government."

From the language of the decisions on this question it seems to be a proper deduction that whenever the

government acquires land for a governmental, as distinguished from a proprietary function, and the acquisition is by purchase with consent of the State, exclusive jurisdiction in the Federal Government follows, as of course.

An examination of the record of the purpose of this project discloses the following:

1. On March 29th, 1932, the Chief of the Corps of United States Army Engineers reported to the Secretary of War, regarding plans for development of the Columbia River, stating that "The primary purpose of this report is 'the formulation of general plans for the most effective improvement of the river for the purposes of navigation, and the prosecution of such improvement, in combination with the most efficient development of the potential water power, the control of floods, and the needs of irrigation'."

2. In the condemnation proceedings by the United States to acquire a part of the lands for this project, the complaint and declaration of taking (R., p. 25) recite the purpose of acquiring same to be for flood control, improvement of navigation, development of electric energy, and irrigation. The particular proceeding shown does not cover lands upon which appellant worked, but is stipulated to be typical of all such proceedings. (R., p. 13.)

3. The Act of Congress passed August 30th, 1935, (H. R. 6732) authorizing and confirming the project, provides:

> "Sec. 2. That for the purpose of controlling floods, improving navigation, regulating the flow of the streams of the United States, providing for storage and for the delivery of the stored waters thereof, for the reclamation of public lands and Indian Reservations, and other beneficial uses, and for the generation of electric energy as a means of financially aiding and assisting such undertakings, the projects known as "Parker Dam" on the Colorado River, and "Grand Coulee

> Dam" on the Columbia River, are hereby authorized and adopted, and all contracts and agreements which have been executed in connection therewith are hereby validated and ratified, and the President, acting through such agents as he may designate, is hereby authorized to construct, operate, and maintain dams, structures, canals, and incidental works necessary to such projects, and in connection therewith to make and enter into any and all necessary contracts including contracts amendatory of or supplemental to those hereby validated and ratified. * * *"

4. A proposed contract between the Columbia Basin Commission, representing the State of Washington, and the United States (R., p. 26), which would give the State of Washington an option to purchase all of the power developed in excess of the needs of the United States, reiterates the purposes of such construction to be for "improvement of navigation, flood control, power development, and ultimately for irrigation," recites in considerable detail the purposes and method of development of the project, and provides the permanent control of same shall remain in the United States, with the State of Washington contributing its pro rata share of cost of operation, if the option to purchase power is exercised by it.

The record conclusively establishes that the primary purpose of the project is a governmental one, namely: improvement of navigation. This was conceded by the Washington Supreme Court when it said, "for present purposes, it may be conceded that the term 'needful buildings' is broad enough, under the construction given to that term by the Federal Courts, to include locks and dams." (R., p. 46.)

Where a governmental purpose is set forth in an Act of Congress as one of the reasons for passage of the act, such purpose may not be inquired into or denied;

Arizona *vs.* California, 283 U. S., 423, 51 S. Ct. 522, 75 Law Ed., 1154,

and the fact that electric energy that comes into being in the operation of works constructed under constitutional authority will be sold is not in derogation of the right of construction.

Ashwander *vs.* Tenn. Valley Authority, 297 U. S. 288, 56 S. Ct. 466, 80 Law Ed., 688.

That improvement of navigation is a governmental function is so firmly established that no citations of authority are necessary.

Appellees urge that because the State of Washington has furnished considerable money to pay for some of the preliminary investigations before the project was taken over by the Federal Government, and because this State is doing the policing of the area and furnishing the educational facilities, and because appellant was required by his contract to carry compensation insurance on his payroll with the State of Washington, these facts show that concurrent jurisdiction was reserved to the State over the area. This argument is wrong in two particulars. In the first place, if the Federal Government acquired exclusive jurisdiction by reason of the constitutional provision it can only be surrendered by an abandonment of the area by the government for the purpose for which it was acquired, or by an Act of the Congress retroceding jurisdiction,

In re Ladd, 74 Fed., 31;

United States *vs.* Unzeuta, 281 US., 138; 50 S. Ct. 284; 74 Law Ed., 761,

and neither of these conditions have happened. Secondly, why should the government object if the State voluntarily takes unto itself some of the duties and expenses of the educational and social needs of the area? That is not a challenge to the jurisdictional rights of the government, and the record is silent

as to any such claim of the State ever officially coming to its attention. As to industrial insurance, the Federal Government has no compensation applicable to work such as this and could make such reasonable requirements of appelant thereto as it might desire. Moreover, the Washington Supreme Court had held in

> Nickell *vs.* Department of Labor & Industries, 164 Wash., 589; 3 Pac. 2nd, 1005, and
>
> State *ex rel* Construction Co. *vs.* Department of Labor & Industries, 167 Wash., 507; 10 Pac. 2nd, 213,

involving contracts performed on lands belonging to the United States that the contractors must carry state industrial insurance.

The question of jurisdiction seldom arises save on criminal and tax matters, and the United States is almost never a party to such proceedings unless its asserted right to criminal jurisdiction is opposed. But that does not mean that any individual, believing that the State is attempting to invade his constitutional rights, may not deny and have the Federal Courts pass upon the jurisdictional right of the State over the matter involved.

If, therefore, the construction of this dam is to improve the navigation of the Columbia River, as the Congress has declared, it is the exercise of a governmental function and the exclusive jurisdiction thereover must be by law vested in the United States.

> Surplus Trading Co. *vs.* Cook, 281 US. 647, 50 S. Ct., 455, 74 L. Ed. 1091.
>
> Concessions Co. *vs.* Morris, 109 Wn. 46, 186 Pac. 655.

Section 8108 of Rem. Rev. Stat. of Washington provides that, "The jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set

apart by the general government for any or either of the purposes before mentioned;" and then reserves the right to serve process on such lands.

In the third rule deduced from the Fort Leavenworth Railroad and following cases, the Washington Supreme Court correctly says: "(3) When the land is acquired for a purpose not within that clause, (Clause 17), but by purchase with the consent of the State, then the United States has such jurisdiction over the land as may be ceded to it by the state." (R., p. 44.)

If this court should be of the opinion that the project in question does not constitute "other needful buildings" then the United States still is a purchaser of land with consent of the State for the site of a dam to improve one of the rivers of the State, with jurisdiction ceded by the State. As was clearly pointed out in U. S. *vs.* Tucker, 122 Fed., 518, it makes no difference whether jurisdiction was acquired by reason of the improvement being another "needful building" and therefore within the actual letter of the Constitution, or by virtue of an express cession by the State. Under either theory *jurisdiction was acquired.*

Appellees assert that the failure of the State of Washington to specifically state that it ceded *exclusive* jurisdiction means that the only cession was of concurrent jurisdiction. However, the State reserved the right to serve process on such lands. It is a cardinal rule of construction that the court shall give effect to the general intent of an act. Here the intent seems plain. If the legislature had intended to grant only concurrent jurisdiction it would have so stated, but when it reserved the right to serve process, all that was not reserved must be considered as intended to be ceded.

> "It is well settled that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted and excludes all other exceptions." (25 R. C. L. 983.)

There are other cases where the statutory words of cession were the same as here, and the cession was regarded as of exclusive jurisdiction. Although the question of exclusiveness was necessarily involved, the construction of the cession was not mentioned in the opinions, apparently being considered as being exclusive.

U. S. *vs.* Unzeuta, 281 US., 138, 50 S. Ct. 284, 74 L. Ed. 761;

In re Ladd, 74 Fed. 31;

School District No. 20 *vs.* Steele, 195 NW. 448.

Winston Bros. Co. *et al., vs.* State Tax Com. of Oregon *et al* 62 Pac. 2nd-7.

The right of a state to cede jurisdiction was considered by Justice Field in the Fort Leavenworth case, *supra.,* where, speaking concerning lands held for public uses, he said:

> "As instrumentalities for the execution of the powers of the General Government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the State as it is for the benefit of the United States."

This view was concurred in by the Washington Supreme Court in Concessions Company *vs.* Morris, 109 Wash., 46; 186 Pac., 655, where the following comments were made:

> "As was decided in Fort Leavenworth R. *vs.* Lowe, above, the legislatures of the various states have power to cede sovereignty to the Federal Government of any territory within the state,***"

And again, speaking of the same decision, the court said:

> "That case establishes * * * that the various states can cede to the Federal Government sovereignty over lands which are held in Federal proprietorship, with such limitations upon that cession of sovereignty as the state may impose, * * *"
>
> See also Yellowstone Park Trans. Co. *vs.* Gallatin Co., 31 Fed. (2nd) 644.

The improvement of rivers and harbors within the state must be considered as a benefit to the state. Therefore, whether such work is held a governmental function or not, certainly it is ample consideration to warrant the cession of jurisdiction, if such be needed to validate the solemn pronouncement of the legislature. But as has been heretofore demonstrated, the purpose of the United States in acquiring these lands was governmental, and that not only complied fully with Clause 17, but is also a complete answer to the Washington Supreme Court's objection to the validity of the cession.

IX.

CONCLUSION.

Appellant submits that the record in these cases conclusively shows that he performed all his work and received all his income within the territory acquired by the United States by purchase with the consent of the state, for the operation of a governmental function; that the United States necessarily acquired exclusive jurisdiction over such territory, and that it was therefore *not within the State of Washingon.* But if the improvement should not be deemed a governmental function the state has ceded its jurisdiction over such area to the United States and there has been no retrocession of same nor abandonment of the project.

No sufficient reason has been advanced why it is necessary or even advisable that the State should have concurrent jurisdiction over this area. For a century and a half the Federal government has been taking very adequate care of the inhabitants of its reservations. This attempt of the State of Washington to repudiate its own legislative act comes with poor grace when it appears from the face of the act that it is for the benefit of the State as well as of the United States.

Appellant prays that the judgment be reversed with costs.

Respectfully submitted,

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